APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No: C 89-4209 VRW
C 90-1712 VRW

DOUGLAS MURRAY,

Plaintiff,

VS.

LABORERS UNION LOCAL NO. 324,
JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR.,
CHARLES EVANS, and BOB DAVIS,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW (JNOV) AND IN SUPPORT OF DEFENDANTS' MOTION FOR NEW TRIAL

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[9] Even before Giancoli was formally removed from the jury panel, defense counsel indicated her concern that the jury was divided seven-to-one and that it would be inappropriate to remove Mr. Giancoli from the panel. The Court, however, was apparently so anxious to obtain a verdict that it even rejected Ms. Benson's suggestion that Giancoli be permitted to continue deliberating with the jury for the remaining hour and fifteen minutes before he had to leave and that the Court ask the jurors if they needed further clarification on any of the instructions which would perhaps help them reach a decision. Ms. Benson noted that the Court could then see whether it was facing the same problem later on in the day:

"MS BENSON: May I make one suggestion, Your Honor? I know yesterday you mentioned to them that if there were instructions they felt they needed further clarification on, that you would be happy to do so.

Perhaps—I mean, Mr. Giancoli still has an hour and fifteen minutes before he has to leave. Perhaps when you bring them in, you could remind them, 'is there a certain area that you would like the Court to give some further instructions or clarification,' just to see if—if there is an area in which you can assist them in breaking whatever deadlock there is.

And then if, come 11:30, this hasn't helped, then I can see that we're facing this problem. But maybe just reminding them that you can give them some clarification if there's something that's really sticking. That maybe, that might help them a little bit."

(Transcript February 24, 1993, pp. 5-6)

Defense counsel's suggestion was, however, rejected by the Court and Mr. Giancoli was dismissed from the jury before the time had even come when he had to leave for his Board meeting.

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[14] juror's removal. Finally, the Court noted that the jury had informed the Court that it was deadlocked on Friday, and it returned a guilty verdict within two hours of Pope's being excused. All of those issues combined convinced the Court that the Defendant had been denied his right to a unanimous verdict, and that the conviction had to be reversed and the matter remanded for a new trial.

In the instant case, the same factors which influenced the Ninth Circuit's decision in *Tabacca* are present. The case here was not an especially long case; Mr. Giancoli would have been able to return the next day; he indicated

on the juror's schedule that he had "no restrictions Thursday and Friday"; a delay of ½ day (or the afternoon) was "unlikely to induce dull memories on the part of the jurors"; the reason for his inability to continue deliberating on the afternoon of the 24th did not involve illness or any physical inability to deliberate (indeed, he had even less restrictions upon his ability to deliberate than Juror Caroe); the Court was well aware that the jury was deadlocked having received at least three notes to that effect, and having received a note signed solely by Mr. Giancoli on the date that he was released stating that the jury was "hopelessly divided"; and the jury returned a unanimous verdict less than an hour after Mr. Giancoli was removed from the jury.

Based upon the facts and the law, the Defendants were denied their right to a unanimous verdict by virtue of the Court's having improperly removed Mr. Giancoli from the jury. As such, the Defendants are entitled to a new trial.

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APPENDIX B

IN THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Nos. 93-15641, 93-16176 and 93-16540

DOUGLAS MURRAY,
and Cross-Appellant
Plaintiff-Appellee,

vs.

LABORERS UNION LOCAL NO. 324, *et al.*,
JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR.,
CHARLES EVANS, and BOB DAVIS,
Defendants-Appellants
and Cross-Appellees.

APPELLANTS' OPENING BRIEF

* * * *

[25] In response, the Court was apparently so anxious to obtain a verdict that it even rejected Ms. Benson's subsequent suggestion [26] that Giancoli be permitted to continue deliberating with the jury for the remaining hour and fifteen minutes before he had to leave and that the Court ask the jurors if they needed further clarification on any of the instructions which would perhaps help them reach a decision. Ms. Benson noted that the Court could then see whether it was facing the same problem later on in the day:

> "MS BENSON: May I make one suggestion, Your Honor? I know yesterday you mentioned to them that if there were instructions they felt they needed further clarification on, that you would be happy to do so.

> Perhaps—I mean, Mr. Ginacoli still has a hour and fifteen minutes before he has to leave. Perhaps when you bring them in, you could remind them, 'is there —is there a certain area that you would like the Court to give some further instructions or clarification,' just to see if—if there is an area in which you can assist them in breaking whatever deadlock there is.
>
> And then if, come 11:30, this hasn't helped, then I can see that we're facing this problem. But maybe just reminding them that you can give them some clarification if there's something that's really sticking. That maybe, that might help them a little bit."
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> (Tr. Feb. 24, 1993, pp. 5-6). (E.R.208-09)

The Court rejected Defense counsel's suggestion and dismissed Giancoli was from the jury even before he had to leave for his Board meeting. Moreover, Juror Giancoli was dismissed without even conducting a *voir dire*. In *Peek v. Kemp, supra,* the Court noted that where the Court is contemplating releasing a juror during deliberations, the Court must, *in order to satisfy Constitutional standards,* conduct a *voir dire* of the juror to make certain that the juror is not being removed solely because he cannot agree to a verdict.

> "Thus, the trial court's failure to inquire into a juror's purported incapacity before the juror is excused acquires Constitutional significance insofar as
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> * * * *

[30] proceed with the remaining eleven jurors. The Court decided to remove Juror Pope and to permit the jury to go on deliberating without him. Approximately two hours after reconvening, the jury returned a verdict. *Tabacca,* at 913.

This Court held the trial court had abused its discretion in removing the juror. Noting that the trial itself had not been long, the juror had stated he would be

able to return the next day, and that "one additional day's delay is unlikely to induce dull memories on the part of the jurors even if they had taken a three day weekend." (*Id.* at 915) Moreover, this Court noted this was not a case of illness or physical incapacity but, rather, simply a case of lack of transportation which did not constitute "just cause" for the juror's removal. Finally, the Court noted that the jury had informed the Court that it was deadlocked on Friday, and it returned a guilty verdict within two hours of Pope's being excused. All of those issues combined convinced this Court that the Defendant had been denied his right to a unanimous verdict, and the matter was remanded for a new trial.

In the instant case, the same factors which influenced this Court's decision in *Tabacca* are present. The case here was not an especially long case; Giancoli would have been able to return the next day; he indicated on the juror's schedule that he had "no restrictions Thursday and Friday"; a delay of ½ day (or the afternoon) was "unlikely to induce dull memories on the part of the jurors"; the reason for his inability to continue deliberating on the afternoon of the 24th did not involve illness or any physical inability to deliberate (indeed, he had even less restriction upon his ability to deliberate than Juror Caroe); the [31] court was well aware that the jury was deadlocked having received at least three notes to that effect; and the jury returned a unanimous verdict less than an hour after Giancoli was removed from the jury.

Based upon the facts and the law, the Defendants were denied their right to a unanimous verdict by virtue of the court's having improperly removed Mr. Giancoli from the jury. As such, the Defendants are entitled to a new trial.

B. *The Jury's Verdict Against The Union And Jesse Durran, Jr. With Respect To The NEC Referral Cannot Stand Since It Is Not Supported By Either The Evidence Or The Law And Is Contrary To This Court's Decision In National Labor Relations Board v. Iron Workers Local Union 75, 583 F. 2d 1094 (9th Cir. 1978)*

Despite the Court's issuance of a Rule 50 Motion in favor of Appellants on Murray's duty of fair representation ("D.F.R.") claims, the Court improperly permitted the jury to consider whether the Union's failure to dispatch Murray to the N.E.C. job constituted a violation of his Landrum-Griffin rights under § 102.[6] Appellants respectfully submit that a hiring hall violation does not state a claim for relief under § 102 of

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[6] The Court's error in permitting this issue to go to the jury was exacerbated when the Court responded to the jury's inquiry as to why they were not deciding the D.R.R. claim. The jury asked if the "Plaintiff had withdrawn" the claim. The Court did not tell the jury that the Plaintiff did not prove his claim. Rather, the Court simply told the jury not to speculate why they were not deciding that issue. Thus, the jury could well have been left with the favorable opinion of Plaintiff that he had voluntarily withdrawn his claim, an opinion which would work to the detriment of Appellants. See, *e.g. Chapa v. Local 18, etc.*, 737 F.2d 929, 932 (11th Cir. 1984) (Where the Plaintiff's claim is unsupported by the evidence and the jury could have been prejudiced by evidence relating to other claims taken away from the jury by directed verdict, the District Court erred in not granting the Defendant Union a JNOV.)